ARKANSAS SUPREME COURT

No. CR 06-172

	Opinion Delivered May 24, 2007
GYRONNE BUCKLEY Appellant	APPEAL FROM THE CIRCUIT COURT OF CLARK COUNTY, CR 99-13, HON. JOHN ALEXANDER THOMAS, JUDGE
v.	
STATE OF ARKANSAS Appellee	AFFIRMED.

PER CURIAM

In 1999, a jury found appellant Gyronne Buckley guilty of two counts of delivery of a controlled substance, for which he received a sentence of two consecutive life terms. This court reversed and remanded for resentencing. *Buckley v. State*, 341 Ark. 864, 20 S.W.3d 331 (2000) (*Buckley I*). Appellant appealed after resentencing, and the new sentence, two consecutive terms of 336 months' imprisonment, for a total term of 672 months' imprisonment, was then affirmed. *Buckley v. State*, 349 Ark. 53, 76 S.W.3d 825 (2002) (*Buckley II*). Appellant timely filed a petition for postconviction relief under Ark. R. Crim. P. 37.1, which was denied without a hearing. On appeal, this court reversed and remanded for hearing as to at least the first four points in appellant's petition and findings of fact as to all points. *Buckley v. State*, CR 04-554 (Ark. June 16, 2005) (per curiam). The trial court conducted a hearing and entered an order following that hearing that once again denied postconviction relief. Now before us is the appeal of that order.

Appellant alleges twelve points of error, as follows: (1) the trial court abused its discretion in

denying relief based upon appellant's claim that two police officers, Roy Bethell and Linda Card, committed perjury, and that this misconduct, as the officers were a part of the prosecution team, was imputed to the prosecutor and violated appellant's right to due process; (2) the trial court erred in denying relief on the basis that the prosecuting attorney failed to disclose to the defense exculpatory evidence concerning conduct of a third police officer, Keith Ray, which ultimately resulted in a federal habeas proceeding determination that Officer Ray had provided material false testimony in another case;[1] (3) the cumulative effect of the prosecutor's failure to disclose exculpatory evidence as detailed in the first two points concerning the three police officer's testimony violated appellant's right to due process; (4) the trial court abused its discretion and erred in denying relief based upon newly discovered evidence that Officer Ray had committed perjury; (5) the trial court erred in failing to find ineffective assistance of counsel for failure to object to jury instructions, or request an instruction, so as to establish a burden of proof for extraneous offenses offered as evidence by the prosecution; (6) the trial court erred in failing to find ineffective assistance of counsel for failure to object to admission of evidence concerning a drug transaction for which appellant was not charged and involving other individuals than appellant; (7) the trial court erred in failing to find ineffective assistance of counsel for failure to object to Officer Card's testimony concerning appellant's source of income and business; (8) the trial court erred in failing to find ineffective assistance of counsel for failure to object to statements by the

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[1] In our previous opinion ordering remand for findings of fact in this case, we referenced the prosecuting attorney here as having some participation in the proceedings in *Bragg v. Norris*, 128 F. Supp. 2d 587 (E.D. Ark. 2000). Mr. Henry Morgan, the prosecutor at appellant's trial, testified during the *Bragg* proceedings, but was not the prosecutor who brought the charges against Mr. Bragg in Nevada County that were the subject of the *Bragg* proceedings. The *Bragg* opinion makes that clear, and our opinion did not intend to imply otherwise. To the extent such could be inferred, the result was inadvertent.

prosecution during closing arguments advancing a "golden rule" argument; (9) the trial court erred in failing to find ineffective assistance of counsel for failure to object to a statement by the prosecution during closing arguments that referenced investigation of appellant for dealing drugs for a period of ten years; (10) the trial court erred in failing to find ineffective assistance of counsel for failure to object to testimony and argument concerning an alleged delivery of drugs to witness Reginald Brim that Brim testified was tied to a murder committed by Johnny Rucker; (11) the trial court erred in finding ineffective assistance of counsel for failure to object to the order that appellant's sentences run consecutively; (12) trial counsel's cumulative deficiencies amounted to ineffective assistance. The State asserts that we should summarily affirm as to appellant's third, fourth, fifth and eleventh points of error because, aside from the State's alternative arguments, appellant failed to obtain a ruling. Appellant counters as to the third and fourth point by asserting the cumulation argument was addressed by the trial court's ruling as to prosecutorial misconduct, in that the ruling addressed all arguments raised concerning prosecutorial misconduct. Appellant argues the remaining two points were addressed through the general ruling as to ineffective assistance of counsel.

We affirm the denial of postconviction relief as to all of appellant's arguments concerning prosecutorial misconduct in his first three points on appeal, regardless of whether the trial court in fact addressed appellant's third issue, because our decision in *Howard v. State*, 367 Ark. 18, ___ S.W.3d ___ (2006), clearly holds that claims of prosecutorial misconduct are not cognizable in a proceeding pursuant to Rule 37.1. Prior to that decision and our order remanding for findings of fact, we had disposed of a number of claims in Rule 37.1 proceedings without directly addressing that issue, and the State had conceded what was, at the time, the open possibility that we might entertain claims of prosecutorial misconduct in the form of perjury in a Rule 37.1 proceeding. Our decision in *Howard* now forecloses further consideration of those claims in this proceeding. A petitioner may seek relief for

prosecutorial misconduct at trial, in a motion for new trial, or through error coram nobis proceedings, but not through a petition for postconviction relief under Rule 37.1.

Appellant's fourth claim alleges the trial court erred in determining relief was not merited on the basis of newly discovered evidence. Rather than prosecutorial misconduct, the basis of the claim is that the evidence of Officer Ray's misconduct, whether wrongly withheld by the prosecution or not, was not available to the defendant at trial and should justify relief. This court has held that newly discovered evidence is a direct effort to have the judgment vacated, and not a proper basis for relief under our postconviction rule. *Cigainero v. State*, 321 Ark. 533, 906 S.W.2d 282 (1995) (citing *Chisum v. State*, 274 Ark. 332, 625 S.W.2d 448 (1981)).

Appellant's fifth through eleventh points of error are claims of ineffective assistance of counsel provided by Mr. Jack Lassiter during the original appeal following the first trial and during the resentencing hearing. A different attorney, Mr. Austin Porter, Jr., represented appellant at trial. Only Mr. Lassiter's conduct is at issue here.

In an appeal from a trial court's denial of postconviction relief on a claim of ineffective assistance of counsel, the question presented is whether, based on the totality of the evidence, the trial court clearly erred in holding that counsel's performance was not ineffective under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). A finding is clearly erroneous when, although there is evidence to support it, the appellate court, after reviewing the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002). The *Strickland* standard is a two-part test. To prevail on a claim of ineffective assistance of counsel under this standard, a defendant must first show that counsel's performance was deficient, with errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment,

and second, the defendant must also show that this deficient performance prejudiced his defense through a showing that petitioner was deprived of a fair trial. *Noel v. State,* 342 Ark. 35, 26 S.W.3d 123 (2000).

There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* The defendant claiming ineffective assistance of counsel has the burden of overcoming that presumption by identifying the acts and omissions of counsel which, when viewed from counsel's perspective at the time of trial, could not have been the result of reasonable professional judgment. *Burton v. State*, 367 Ark. 109, ___ S.W.3d ___ (2006). The petitioner must show that, but for counsel's errors, the fact-finder would have had a reasonable doubt respecting guilt and that the decision reached would have been different absent the errors. *Id.*

Briefly, the evidence at trial showed that the Arkadelphia Police Department received information from a confidential informant, Corey Livsey, concerning appellant, and contacted the South Central Drug Task Force for assistance in the investigation. Two officers from the task force, Officer Card and Officer Ray, along with Officer Bethell from the Arkadelphia Police Department, conducted controlled buys from appellant at his home on two successive evenings, the 12th and 13th of January, 1999.

Officer Ray, on both occasions, took Livsey, who was wearing a body microphone to record conversations, to a location near appellant's house, searched him to be sure that he had no drugs on his person, and provided him with the cash for the purchase. Livsey testified that he made the buys using slang terms, but the tape did not contain conversation clearly indicating that a drug transaction was taking place. After the buy, Officer Ray picked Livsey up, took the drugs, and searched Livsey to be sure he no longer had the buy money.

Officers Card and Bethell observed Livsey during the purchases from a position at a nearby

intersection, and Officer Card stated that she observed appellant place his hands on a rafter on the porch. During a search of appellant's house the day after the last buy, Officer Card looked in the rafters and found tweezers, aluminum foil with marijuana seeds in it, a pill bottle and sandwich bag with drug residue.

Appellant's fifth point and first claim of ineffective assistance concerns counsel's failure to request that the jury instructions include the burden of proof as to the evidence admitted concerning offenses other than those charged. At the resentencing hearing, evidence was presented that implicated appellant in drug transactions, other than the two buys conducted through Livsey that resulted in charges. On appeal of the sentencing hearing, counsel argued error based upon the failure of the jury to be instructed that the burden of proof as to these prior offenses was preponderance of the evidence.

As noted earlier, the State asserts that the trial court failed to provide a ruling on this issue and on another issue of ineffective assistance raised in appellant's eleventh point, that counsel was ineffective for failure to object to the trial court's decision to run the sentences consecutively. We do not agree that the trial court's general finding that counsel was not ineffective should suffice. The trial court did provide some additional findings as to appellant's other claims of ineffective assistance, and clearly neglected to address the issues of the jury instruction and the decision to run the sentences consecutively. Failure to obtain a ruling on an issue at the trial court level, including a constitutional issue, precludes review on appeal. *See Howard*, 367 Ark. at 31, ___ S.W.3d at ___; *Beshears v. State*, 340 Ark. 70, 8 S.W.3d 32 (2000).

Appellant argues that because this case was remanded for findings of fact, we should make an exception to this rule concerning findings of fact. He also suggest that there is no procedure by which to obtain a ruling. Appellant does not develop any argument as to why remand should alter our general

rule and none is apparent. This court does not research or develop arguments for appellants. *Hester v. State*, 362 Ark. 373, 208 S.W.3d 747 (2005). In addition, appellant is mistaken that no procedure permits him to obtain a ruling. In *Beshears*, this court noted that a petitioner may request the court to modify its order to include the omitted issue through a motion for reconsideration, without violation of the prohibition against rehearing in Ark. R. Crim. P. 37.2(d). *Beshears*, 340 Ark. at 73, 8 S.W.3d 34. We do not address the fifth and eleventh points as appellant did meet his burden to obtain a ruling on the issues.

In his next point, appellant argues that counsel at the resentencing hearing was ineffective for failure to object to evidence of a drug transaction between Livsey and Eli McGhee. Appellant acknowledges that counsel did object on the grounds of hearsay to testimony identifying McGhee's voice saying, "Gyronne told me to give you this." A limiting instruction was provided by the court concerning the hearsay, but there was no further objection to the testimony concerning admission of the transaction. Appellant argues that if the transaction did not implicate appellant as the supplier of the drugs, it was not relevant and should not have been admitted. Counsel's testimony was that he had no clear memory of any specific reason why he did not object, but that he may not have wanted to call further attention to the testimony when appellant's name was not mentioned. The trial court found that counsel's failure to object was trial strategy.

We cannot say that the trial court was clearly erroneous to determine that the failure to object was trial strategy, and further we must conclude that appellant failed to carry his burden under the second prong of the *Strickland* test to show prejudice. Where the trial court has determined a decision by counsel was a matter of trial tactics or strategy, and that decision is supported by reasonable professional judgment, then a decision not to call a witness or challenge a statement may not be a proper basis for relief under Rule 37.1. *Weatherford v. State*, 363 Ark. 579, 215 S.W.3d 642 (2005) (per

curiam). Experienced advocates might differ about when, or if, objections are called for because, as a matter of trial strategy, further objections from counsel may succeed in making the comments seem more significant to the jury. *Nance v. State*, 339 Ark. 192, 4 S.W.3d 501 (1999).

Matters of trial strategy and tactics, even if arguably improvident, fall within the realm of counsel's professional judgment and are not grounds for a finding of ineffective assistance of counsel. *Noel*, 342 Ark. at 41, 26 S.W.3d 127. Even though another attorney may have chosen a different course, trial strategy, even if it proves unsuccessful, is a matter of professional judgment. *Id.* The trial court here did determine that this decision was a matter of trial strategy.

When counsel was questioned, he did not have a distinct recollection of his reasons but concluded that he most likely did not want to call further attention to the testimony. Without the testimony, the jury could have determined that the evidence did not show a connection between the appellant and this particular drug sale; but, considering the sale's proximity in time and place to the transaction in which Livsey approached appellant for drugs, the weight of that evidence was properly within the jury's prerogative to determine. Judicial review of counsel's performance must be highly deferential, and a fair assessment of counsel's performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's conduct, and to evaluate the conduct from counsel's perspective at the time. *Andrews v. State*, 344 Ark. 606, 42 S.W.3d 484 (2001) (per curiam). We cannot say that counsel's decision was not supported by reasonable professional judgment.

Nor did appellant meet his burden to show prejudice. The State asserts, and appellant does not contest, that the sentences received by appellant were well within the statutory range for the charges. A defendant who has received a sentence less than the maximum sentence for the offense cannot show prejudice from the sentence itself. *Smith v. State*, ___ Ark. ___, ___S.W.3d ___ (Feb. 1, 2007) (citing

Franklin v. State, 351 Ark. 131, 89 S.W.3d 865 (2002)). Under that holding, we must conclude that prejudice was not shown as a matter of law because appellant received less than the maximum sentence for the offense charged. Appellant would challenge our holding in Smith on the basis that it conflicts with the United States Supreme Court's decision in *Glover v. United States*, 531 U.S. 198 (2001). Yet *Glover* is not applicable to the case before us.

Glover concerned a defendant who attacked his sentence by a showing of deficient performance through his counsel's failure to object to an error of law affecting the calculation of a sentence. A lower court had found that the enhanced sentence did not meet a baseline standard of prejudice. In reversing the lower court's ruling, the Court specifically noted a distinction between the situation in *Glover* and a case where trial strategies, in retrospect, might be criticized for leading to a harsher sentence. *Glover*, 531 U.S. at 204. The distinction noted in *Glover* is precisely what is at issue here – a matter of trial strategy. There was no error in the calculation of the sentence itself; appellant argues that he would have received a less harsh sentence if his attorney had chosen a different tactic concerning the evidence submitted to the jury. Appellant would argue that the weight of this evidence in the jury's deliberations was much greater than the value attributed to it by counsel, and the prejudice flowed from the additional weight given to it.

Although, in his reply brief, appellant for the first time attempts to characterize this and other evidence as hearsay, he has not demonstrated that it was introduced without personal knowledge of the witness and, moreover, he did not raise that argument below. Clearly, as to this point, counsel did object to the testimony that was hearsay, but the objection appellant argues his attorney failed to make was not a hearsay objection. Rather than a hearsay objection that might have put into issue a deprivation of a substantive or procedural right, the objection appellant asserted in his petition was an evidentiary issue

– the balancing of probative value against unfair prejudice. Under these circumstances, we consider the fundamental fairness of the proceedings, in addition to whether the decision might have been different, and conclude that no legitimate prejudice occurred here because appellant did not receive the maximum sentence. *See Williams v. Taylor*, 529 U. S. 362 (2000).

Appellant's seventh and tenth points of error involve assertions that counsel failed to object to testimony, with the seventh point addressing Officer Card's efforts to establish appellant's source of income and business and the tenth point directed at Brim's testimony that related to a drug transaction where the drugs sold were then shared with the killer in a notorious murder case. These issues also included assertions that counsel failed to make objections based upon the danger of unfair prejudice outweighing the probative value of the evidence. Appellant argues as to the latter point that the evidence was so inflammatory as to violate his right to due process.

Counsel testified that his research had shown that Officer Card's testimony and the evidence of other drug transactions were admissible during the sentencing phase. As to the transaction involving the murder, he chose instead to bring out on cross-examination that appellant was not involved with the murder. Appellant did not argue below that there was a basis for a hearsay objection to this evidence, and counsel's conclusion that the evidence was generally admissible was supported by our decision in *Buckley I*. In appellant's first direct appeal, we stated that evidence of his prior drug sales may be admissible during the sentencing phase, but the evidence would still be subject to the rules of evidence. *Buckley I*, 341 Ark. at 874-875, 20 S.W.3d 338-339. Counsel's strategic decision bearing upon how to limit the prejudice of that evidence falls into the same category with that in his sixth point of error. Once again, appellant cannot show that he was prejudiced by any error of this type because he did not receive the maximum sentence. The fact that appellant did not receive the maximum sentence also counters his argument that the evidence was so inflammatory as to violate due process.

Appellant's eighth and ninth points allege ineffective assistance through counsel's failure to object to remarks by the prosecutor during closing arguments. Because many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements, the failure to object during closing argument and opening statement is within the wide range of permissible professional legal conduct. *Howard*, 367 Ark. at 44-45, ___ S.W.3d at ___. Neither remark here was such an egregious misstatement.

The first remark by the prosecutor of which appellant complains was a statement that appellant characterizes as a "golden rule" argument. The prosecutor argued to the jury, "This man has been selling drugs--he just hasn't been caught--over, and over, and over again in Arkadelphia, Arkansas, to your friends and family." The State contends this statement was a "send-a-message" argument, rather than a "golden rule" argument, citing *Lee v. State*, 340 Ark. 504, 11 S.W.3d 553 (2000). As we noted in *Lee*, a "golden rule" argument is an impermissible argument where the jury is implored to put themselves in the position of the victim, while a "send-a-message" argument is allowed because it urges the jury to deter criminal behavior and foster respect for the law. *Id.* at 517, 11 S.W.3d at 561. While the prosecutor's remark here was similar to that in *King v. State*, 317 Ark. 293, 877 S.W.2d 583 (1994), where the prosecution urged the jury to send a message to those who might harm the jury's own family members, and would have supported an objection, we cannot say that this was the type of misstatement that is so egregious that it requires counsel to object during closing argument.

Appellant argues that trial counsel did not make a strategic decision to withhold his objection, pointing to counsel's testimony that he believed at the time that the argument was not objectionable. Yet, even had he realized that an objection would be sustained, counsel might well have made a strategic decision not to call attention to the statement through an objection. Had counsel raised the objection, the likely result would have been a specific limiting instruction as was provided in *King*. An

attorney may reasonably decide not to object under those circumstances, preferring not to draw attention to the remark. For that reason, appellant has not met his burden to show the omission could not have been the result of reasonable professional judgment. The action was not error under the circumstances, even if actually based upon an erroneous assumption, because it could still have been the result of reasonable professional judgment. In other words, the misstatement was not so egregious as to merit departure from our general rule concerning objections during closing arguments.

Similar reasoning leads us to the same conclusion in connection with the second contested statement by the prosecution. In appellant's ninth point, he argues that counsel should have objected when the prosecutor indicated that the drug task force had been investigating appellant's business records for over ten years. Appellant argues that the prosecutor was making substantially the same argument made during appellant's first trial that was based upon impermissible hearsay evidence. But the testimony of Officer Card during the resentencing hearing supported this argument, with the exception that the investigation had covered a period of eight years rather than ten. Counsel testified that he did not want to object to a misstatement of two years. We cannot say that decision was not supported by reasonable professional judgment.

Appellant's last point is an argument alleging that trial counsel's errors should be considered cumulatively to determine whether counsel failed to provide effective assistance. Appellant acknowledges that we do not recognize the doctrine of cumulative error. In fact, this court has consistently refused to recognize the doctrine of cumulative error in allegations of ineffective assistance of counsel. *Weatherford*, 363 Ark. at 589-588, 215 S.W.3d at 649-650. We decline to reconsider that holding now.

The trial court was not clearly erroneous in denying appellant's claims of prosecutorial misconduct or newly discovered evidence, or in finding that counsel was not ineffective. Having found

no reversible error in the trial court's order, we affirm the denial of postconviction relief.

Affirmed.